Probate in Montana

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Probate is the administrative process of settling an estate whether a decedent died with or without a will. This MontGuide describes probate functions, types of estate administration, cost of probate and protections for surviving immediate family members.

WHEN A PERSON DIES, WITH OR WITHOUT A WILL, Montana laws provide a legal process determining the market value of his or her real and personal property and their distribution to appropriate parties.

One procedure, termed probate, takes place in the district court of the county where the deceased person had residence. Probate is not required for any property the decedent held in trust or any property held in joint tenancy with right of survivorship with another person. If the deceased owned real property located in another state, an “ancillary administration” proceeding in that state may be necessary.

The Montana Legislature passed the Uniform Probate Code (UPC) to provide rules to simplify probate in a district court. Probate in Montana is not nearly as burdensome or expensive as it is in other states that have not adopted the UPC. In some states, probate can be quite costly, because an attorney and personal representative must appear before the court for approval of almost every action involved in settling an estate. In Montana, formal approval by the district court is not required for any action already authorized in the UPC.

This MontGuide is designed to explain some aspects of probate. It is not intended to serve as a complete guide for probate; all details could not possibly be included. Statements apply to general situations. Solutions to specific problems relating to probate often depend upon the facts of each case.

Personal Representative

Probate is the administrative process of settling an estate whether the decedent died with or without a will. If appointed, the personal representative named in your will has the responsibility of settling your estate according to the provisions of it and Montana law. The personal representative may be a family member, a friend, an attorney, a corporate entity such as a bank or trust company, or a combination of these.

If you die without a will, the Montana UPC lists the order in which eligible persons may apply for appointment as a personal representative. The order is: the surviving spouse named in a will, the custodial parent of a minor decedent, other devisees (persons named in a will) of the decedent, the surviving spouse of the decedent, and other heirs (persons to receive property under intestate statutes if the decedent died without a will) of the decedent. (Further information is provided in the MontGuide Personal Representative Responsibilities (MT199008HR).

Probate Functions

Probate proceedings have the following major functions:

- to determine the validity of and interpret wills;
- to discover, collect, manage and protect estate assets until final distribution;
- to settle claims of creditors;
- to settle federal and state obligations, if due;
- to distribute the decedent’s property to his or her heirs according to Montana’s law of intestacy (dying without a will) and devisees (those named in the will); and
- to provide a method of securing the legal transfer of real estate or personal property ownership (cars, stocks, bonds, and so on).

Although probate may seem lengthy and detailed, it is provided by Montana law to assure that the property of the deceased is accounted for, and that all debts and taxes are paid. Someone must carry out the business of the estate and see that the property is distributed to the designated parties.

Nonprobate Property

An appointment of a personal representative is not required if all property held by the decedent is nonprobate property. Examples of nonprobate property include:

- property held in joint tenancy with right of survivorship;
- property held in trust;
- life insurance payable to a named beneficiary;
- payable on-death (POD) deposits at financial institutions;
- assets in a pension plan to named beneficiary;
- individual retirement accounts to a designated beneficiary;
- transfers-on-death (TOD) registrations for beneficiaries on securities and securities accounts and transfer on death deeds for real property. (Further information is provided in the MontGuide Nonprobate Transfers (MT199509HR).

However, there are reporting requirements for these types of property for determination of Montana and federal income taxes and perhaps federal estate taxes.
Types of Estate Administration

Under Montana law, probate may be administered: as an informal proceeding; as a formal procedure; by supervised administration; by collection of personal property by affidavit; or as a small estate summary administrative procedure. An estate may be opened formally and closed informally, opened informally and closed formally, or any combination.

Informal Procedure – An application for informal probate or informal appointment of a personal representative can be directed to the clerk of a district court no sooner than 120 hours after the decedent’s death. If the clerk determines that all requirements of law have been met, he or she files the will and appoints the personal representative who can then proceed to settle the estate.

Formal Proceeding – Formal probate may be necessary when no will exists, when the validity of a will may be questioned, or when parties disagree about the appointment of a personal representative or distribution of the assets. With formal probate, proceedings are held before a district court judge after notice of the hearing is given to interested persons. These include heirs, devisees and any other persons or businesses having a property right in or claim against the estate. In informal, formal and supervised probate procedures, creditors must be given four months to submit claims for debts after the first publication of the notice in a local newspaper.

Those who contest a will have the burden of establishing that the person who wrote it lacked testamentary intent or capacity or was under undue influence or duress. Other circumstances for contesting a will involve fraud, mistakes or the revocation of prior wills.

The personal representative may choose to close the estate on a formal basis six months after his or her appointment if the creditor’s claim period has expired. The personal representative must give proper notice to interested persons, file a final account, and determine heirs and distributed property either under the provisions of the will or the laws of intestacy.

Supervised Administration – This proceeding secures administration and settlement of a decedent’s estate under the continuing authority of the court. Supervised administration can occur in a formal or informal probate and extends until entry of an order approving distribution of the estate, and discharging the personal representative, or other order terminating the proceeding.

Collection of Personal Property by Affidavit – This procedure may be initiated 30 days after a person dies, if the value of the entire estate (less liens and encumbrances) does not exceed $50,000. Any devisee or heir may collect the personal property as well as money owed to the decedent by presenting an affidavit to individuals or institutions holding the decedent’s real or personal property.

Small Estate Summary Administration – If it appears from an inventory and appraisal that the value of the entire estate (less liens and encumbrances) does not exceed the homestead allowance of $22,500; exempt property of $15,000; family allowance of $27,000; cost and expenses of administration; reasonable funeral expenses and reasonable and necessary medical and hospital expenses of the last illness of the decedent – then a small-estate summary administrative procedure can be used. The personal representative, without giving notice to creditors, may immediately distribute the estate to the persons entitled and file a closing statement. The small estate administrative procedure can begin five days after the death of the decedent, and as soon as the personal representative determines that the value of the estate does not exceed the outstanding debt.

How Long Does Probate Take?

Because the situation in every estate varies, the schedule for each may be different. If the personal representative hires an attorney to assist with the probate, he or she should ask the attorney to provide an estimated time when the probate will be completed. In some situations, probate can be finished within six months. When the formal procedure is followed, the typical time required to complete probate is about ten months.

In other cases, where the estate includes assets that are difficult to value and where it faces federal estate taxation, the estate may not be closed until the audit of a federal estate tax return is complete. The Internal Revenue Service has three years after the filing of the federal estate tax return to complete an audit.

If a personal representative chooses to close an estate on an informal basis, he or she would file with a court a verified statement showing that he or she has complied with the Montana laws in completing the probate no earlier than six months after the date of original appointment as personal representative. If no proceedings involving the personal representative are pending one year after filing the closing statement, the appointment of the personal representative terminates.

If an estate is not closed within two years from the date the personal representative is appointed, a Supreme Court administrator will notify a district court judge. That judge will then order the personal representative and attorney to appear before the court to disclose reasons why the estate has not been closed. If there is not just cause, the judge may order the estate be closed within 30 days and declare that the attorney and personal representative are not to receive compensation.

Responsibilities of Personal Representatives

The personal representative has a duty to settle and distribute the estate of the decedent according to the
terms of any probated will or the Montana laws of intestacy. (The acknowledgement of fiduciary relationship and obligation form for a personal representative is available online at www.montana.edu/estateplanning/acknowledgementoffiduciaryrelationship.pdf). A more detailed description is included in the MontGuide Personal Representative Responsibilities (MT199008HR). The following responsibilities are typical:

1. The personal representative notifies heirs and devisees of his or her appointment within 30 days.

2. Upon his or her appointment, the personal representative publishes a notice announcing his or her appointment and address, once a week for three consecutive weeks in a newspaper of general circulation in the county. The personal representative notifies creditors of the estate to present claims within four months after the first publication of the notice.

3. The personal representative pays all bills and federal estate taxes (if due) from the assets of the estate and distributes the remaining assets. All expenditures must be accounted for.

4. The personal representative may close the estate on an informal basis by filing with the court a verified statement stating that he or she has complied with the provision of the probate code. The estate may be closed on a formal basis after proper notice to interested persons about the times for a hearing on the final accounting, and the formal hearing before a district court judge.

How much does probate cost?

There is no standard answer to this question. The cost depends on the size and complexity of the estate. In 2019, the initial filing fee to begin probate is the same in every district court – $70, which includes the fee for filing a will. The cost for copying papers in the clerk’s files is $1 per page for the first 10 pages of each file, and 50 cents for each additional page. Other costs may include publication costs, appraisals, advertising expenses for sales (if any are made), sale expenses for any auctions or property sales, and insurance premiums.

If a personal representative hires an attorney to handle legal aspects of the settlement of the estate, the attorney’s compensation must be reasonable. The 2019 Legislature changed attorney’s fees from a percentage of the value of the estate to a reasonable charge.

The Montana Supreme Court has established a seven-part test applicable to all civil matters by which the reasonableness of an attorney’s fee is determined. For example, the court evaluates the requirements of the case, such as technical skills, the time required and the complexity of the issues. Consider hiring an attorney who specializes in probate.

### Protections for Surviving Spouse

The UPC exempts certain property and allowances that the surviving spouse and minor children are entitled to in preference over unsecured creditors of the estate and persons to whom the estate may be devised by will. Basic family protections are: the surviving spouse’s right to an elective share, the homestead right, exempt property, and a family allowance.

#### Surviving Spouse’s Right to an Elective Share –

This statute is effective for the surviving spouse of a decedent domiciled in Montana. He or she has the right to take an elective share that is a percentage of the augmented estate of the decedent and the surviving spouse. The elective share increases in percentage from three to 100 percent, based on the length of the marriage (See Table 1).

<table>
<thead>
<tr>
<th>If the decedent and the spouse were married to one another</th>
<th>Percentage of augmented estate</th>
</tr>
</thead>
<tbody>
<tr>
<td>AT LEAST 1 year</td>
<td>3%</td>
</tr>
<tr>
<td>LESS THAN 2 years</td>
<td>6%</td>
</tr>
<tr>
<td>3 years 4 years</td>
<td>12%</td>
</tr>
<tr>
<td>4 years 5 years</td>
<td>18%</td>
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<tr>
<td>5 years 6 years</td>
<td>24%</td>
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<td>6 years 7 years</td>
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<tr>
<td>14 years 15 years</td>
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<tr>
<td>15 years or more</td>
<td>84%</td>
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<tr>
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<td>90%</td>
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<td>17 years or more</td>
<td>96%</td>
</tr>
<tr>
<td>18 years or more</td>
<td>100%</td>
</tr>
</tbody>
</table>

To protect spouses in small estates, there is a minimum elective share amount of up to $75,000.

The spouse’s elective share is in addition to other benefits provided under the Uniform Probate Code, including the homestead allowance of $22,500, personal property allowance of $15,000, and family allowance – a maximum of $27,000 for a total of $64,500.

The right of election of a surviving spouse, and the rights of the surviving spouse to homestead allowance, exempt property and family allowance (or any of them), may be waived, wholly or partially, before or after marriage, by a written contract, agreement or waiver signed by the surviving spouse. A surviving spouse’s waiver is not enforceable if the surviving spouse proves that:

a. The waiver was not executed voluntarily.

b. The waiver was unconscionable when it was executed and, before execution of the waiver, the surviving spouse:
(1) was not provided a fair and reasonable disclosure of the property or financial obligations of the decedent,
(2) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligation of the decedent beyond the disclosure provided, and
(3) did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligation of the decedent.

The Montana Uniform Probate Code provides an extensive definition of the augmented estate and elective share. The definition is not provided here because of its substantial length. A copy can be obtained from an attorney or from the Montana Code Annotated at a local library.

In general, the augmented estate includes assets owned by the decedent at the time of death, as well as assets over which the decedent exercised control or enjoyment, and transfers made without consideration within two years prior to death. This provision is designed to make it difficult for a decedent to intentionally disinherit a surviving spouse by giving all of his or her property away or placing it in a revocable living trust shortly before death.

**Homestead Allowance** – A surviving spouse of a decedent who was a resident of Montana is entitled to a homestead allowance of $22,500. If there is no surviving spouse, each minor child and each dependent child of the decedent is entitled to a share of the homestead allowance amounting to $22,500 divided by the number of minor and dependent children of the decedent. The homestead allowance is exempt from and has priority over all claims against the estate, including unsecured creditors of the estate and personal effects. If there is no surviving spouse, the spouse or children are entitled to other assets of the estate to the extent necessary to make up the amount.

**Family Allowance** – The surviving spouse and minor children whom the decedent was obligated to support, and children who were in fact being supported by him or her, are entitled to a reasonable family allowance in cash from the estate for their maintenance during the period of probate administration. The personal representative may determine the family allowance in a lump sum not exceeding $27,000 or periodic installments not exceeding $2,250 per month for one year. The district court may approve a larger sum.

**Survival Requirement** – A provision of the UPC states that any person who fails to survive the decedent by more than 120 hours (five days) is considered to have died before the decedent for purposes of inheritance, homestead allowance, exempt property and intestacy. This statute eliminates the need for double probate on the same property in situations where several members of the same family are killed or injured, and die within a few days of one another. The 120-hour survival requirement applies to persons who die without a will, and to those who have a will without a specific survival clause.

**Summary**

Probate is a legal administrative process of settling an estate whether the decedent dies with or without a will. Although the procedure may seem lengthy and detailed, it assures that all property of the deceased is accounted for and that all debts and taxes are paid. Probate in Montana is not nearly as burdensome or costly as it is in states that have not adopted the UPC.

**Disclaimer**

This publication is not designed as a substitute for legal advice. Rather, it is designed to help people become better acquainted probate. Future changes in laws cannot be predicted and statements in this MontGuide are based solely on the laws in force on the date of publication.

**Acknowledgements**

The Business, Estates, Trusts, Tax, and Real Property Law Section, State Bar of Montana has approved this MontGuide and recommends its reading by all Montanans.